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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Telephone Number Portability Cost Classification Proceeding	)	CC Docket No. 95-116 RM 8535

AT&T CORP. OPPOSITION TO APPLICATIONS FOR REVIEW

Pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, AT&T Corp. ("AT&T") hereby opposes the four applications for review ("Applications") of the Memorandum Opinion and Order ("LNP Cost Classification Order") in the above-captioned proceeding.[1] In that order, the Common Carrier Bureau ("Bureau"), acting on delegated authority, promulgated requirements concerning the costs that ILECs could properly include in their tariffs for local number portability ("LNP") end-user surcharges and query charges. The Applications, though prolix, raise a straightforward challenge to the LNP Cost Classification Order -- a challenge that is utterly baseless, and that the Commission should reject without hesitation.

[1] Memorandum Opinion And Order, Telephone Number Portability Cost Classification Proceeding, CC Docket No. 95-116, RM 8535 (released December 14, 1998) ("LNP Cost Classification Order"). A list of parties submitting applications for review and the abbreviations used to identify them are set forth in an appendix to this opposition.

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I. THE BUREAU CORRECTLY INTERPRETED THE *LNP COST RECOVERY ORDER* AND DID NOT EXCEED THE AUTHORITY DELEGATED TO IT BY THE COMMISSION

The LNP Cost Classification Order imposed a two-part test to determine whether a cost purportedly incurred by an ILEC is "directly related to the implementation and provision of telephone number portability," and therefore eligible for LNP cost recovery pursuant to the Commission's rules.

> Under this test, to demonstrate that costs are eligible for recovery through the federal charges recovery mechanism, a carrier must show that these costs: (1) would not have been incurred by the carrier "but for" the implementation of number portability; *and* (2) were incurred "for the provision of" number portability service.[2]

Although they repeat their arguments in a variety of forms, the applicants all make the same fundamental claim: they allege that the Bureau misinterpreted the Commission's LNP Cost Recovery Order[3] in promulgating the second prong of the above test.

The applicants argue that they should be able to recover any costs that they would not have incurred "but for" implementation of LNP. In short, the Applications assert that the Commission's prior orders allow ILECs to recover in their LNP surcharges and query charges not only the costs of the systems actually utilized to port numbers between carriers and to conduct LNP queries, but also the costs they incur to modify any system that is affected by the advent of LNP.[4] The applicants argue that the Commission has

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2 Id., ¶ 10.

3 Third Report and Order, Telephone Number Portability, CC Docket No. 95-116, FCC 98-82 (released May 12, 1998) ("LNP Cost Recovery Order").

4 Number portability breaks the link between the first three digits of a customer's seven-digit telephone number (the "NXX") and the carrier that provides his or her

(footnote continued on next page)

authorized ILECs to recover as "LNP costs" expenses such as their costs to modify their own internal OSS for functions ranging from directory assistance to pre-ordering to calling card verification.[5] According to the Applications, the Bureau misread the LNP Cost Recovery Order, which they allege specifically directs the Bureau to permit ILECs to recover any "but for" LNP expenses.[6] Even a brief review of that order, however, reveals that the ILEC applicants' claims are meritless.

Paragraphs 8-19 of the LNP Cost Classification Order provide a cogently reasoned explanation of the Bureau's decision that is carefully grounded in the text of the LNP Cost Recovery Order. Paragraph 12, for example, specifically rejects ILEC arguments that the Commission's rules require only a "but for" test:

> Several LECs argue that all costs that would not have been incurred but for portability should be included as eligible LNP costs. In effect, these LECs would define "for the provision of portability" as including all costs related to any changes made necessary as a consequence of LNP. We disagree. In our view, the

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> local service. Once LNP is in place, customers in the same NXX can be served by different LECs, and carriers must modify their internal systems to account for this fact.

5 See, e.g., Ameritech, p. 6, n.5; U S West, pp. 8-10.

6 Ameritech repeatedly couches its Petition as a request for "clarification." It is plain, however, that the LNP Cost Classification Order held that ILECs may not claim as expenses "directly related to LNP" costs that are not actually used for the provision of portability. There is simply no need for the Bureau to "clarify" statements such as "in submitting their tariffs, we require LECs to distinguish clearly costs incurred for narrowly defined portability functions from costs incurred to adapt other systems to implement LNP, such as repair and maintenance, billing, or order processing systems." LNP Cost Classification Order, ¶ 12. Ameritech, like the other applicants, seeks reconsideration of the order.

> Commission adopted a very narrow definition of this phrase in the [LNP Cost Recovery Order], stating that the only eligible LNP costs are "costs carriers incur specifically in the provision of number portability services, such as for the querying of calls and the porting of telephone numbers from one carrier to another."[7]

The underscored passage above is quoted directly from the LNP Cost Recovery Order. Elsewhere in the LNP Cost Classification Order, the Bureau noted that the LNP Cost Recovery Order also ruled that: "Costs that carriers incur as an incidental consequence of number portability, however, are not costs directly related to providing number portability."[8]

In addition to the above-quoted statements, the Commission's LNP Cost Recovery Order provided that

> we will consider as subject to the competitive neutrality mandate of section 251(e)(2) all of a carrier's dedicated number portability costs, such as for number portability software and for the SCPs and STPs reserved exclusively for number portability. We will also consider as carrier-specific costs directly related to the provision of number portability that portion of a carrier's joint costs that is demonstrably an incremental cost carriers incur in the provision of long-term number portability.[9]

The applicants would simply ignore the underscored text above -- and argue that the Bureau is somehow compelled to ignore it, too. Contrary to the Applications' repeated claims, the LNP Cost Recovery Order unequivocally supports the Bureau's ruling. As the Commission observed in its order "carrier-specific costs directly related to providing

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7 LNP Cost Classification Order, ¶ 12 (quoting LNP Cost Recovery Order, ¶ 72) (emphasis added); see also id., ¶ 26.

8 LNP Cost Recovery Order, ¶ 72 (cited in LNP Cost Classification Order, ¶ 26).

9 Id., ¶ 73 (emphasis added).

number portability only include costs carriers incur specifically in the provision of number portability."[10]

One of the several forms the ILEC applicants' attack on the LNP Cost Classification Order assumes is the argument that the statutory definition of "number portability" requires the Bureau to adopt a purely "but for" test for cost recovery.[11] Section 3 of the 1996 Act defines portability as "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another." The Applications contend that Congress' reference to "quality" and "reliability" requires that they be permitted to recover the costs of modifying any system tangentially affected by LNP. That claim is groundless.

The LNP Cost Classification Order expressly considered and rejected the ILECs' "impairment of quality" argument, finding that the LNP Cost Recovery Order did not support such an interpretation.[12] That conclusion plainly is correct. The Commission discussed the implications of the statutory definition of number portability in paragraphs 36 and 37 of the LNP Cost Recovery Order. In that discussion, it described as "costs of

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10 Id., ¶ 74 (emphasis added).

11 See, e.g., Ameritech, pp. 10-11; Bell Atlantic, p. 2; CBT, p. 6. Bell Atlantic offers a Declaration by Robert Crandall, an economist, "attesting" that the Bureau's conclusions are inconsistent with the Act's definition of number portability. Bell Atlantic, Declaration of Robert Crandall, p. 3. As demonstrated above and in AT&T's prior comments in this docket, the Bureau's analysis of the statute is more persuasive than Dr. Crandall's.

12 See LNP Cost Classification Order, ¶ 13.

number portability" only the types of expenses that the Bureau allowed in the LNP Cost Classification Order:

> "[T]he costs of number portability" are the costs of enabling telecommunications users to keep their telephone numbers without degradation of service when they switch carriers. Such costs include the costs a carrier incurs to make it possible to transfer a telephone number to another carrier, as well as the costs involved in making it possible to route calls to customers who have switched carriers (*i.e.*, the costs involved in making the N-1 querying protocol possible). ....
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> ****
>
> Costs not directly related to providing number portability encompass a wide range of costs that carriers incur to provide telecommunications functions unrelated to number portability. .... Because costs not directly related to providing number portability are not subject to 251(e)(2), the Commission is not obligated under that section to create special provisions to ensure that they are borne on a competitively neutral basis.

Although the Applications strive to find shades of meaning in the LNP Cost Recovery Order that might support their desire to utilize a "but for" test for LNP cost recovery, the plain text of that document compels the conclusions the Bureau reached in the LNP Cost Classification Order.[13]

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[13] U S West also seeks to support its claim to recover costs disallowed by the LNP Cost Recovery Order by asserting that ILECs will "spend far more to implement LNP than any other group of carriers." U S West, p. 11 (citing LNP Cost Recovery Order, ¶ 137). That claim, is of course, irrelevant to the legal standard the Commission should apply under § 251(e). Moreover, it fails to mention that the very paragraph of the LNP Cost Recovery Order U S West cites went on to hold that on a per-customer basis, ILECs do not incur higher LNP costs than CLECs.

II. CONTRARY TO THE ASSERTIONS OF CBT AND U S WEST, THE BUREAU DID NOT REQUIRE CARRIERS TO RECOVER LNP COSTS VIA ACCESS CHARGES OR OTHER PROHIBITED MEANS

Cincinnati Bell and U S West argue that the LNP Cost Classification Order requires them to recover their LNP costs through access charges or traditional rate-of-return or price cap tariffs,[14] in violation of the LNP Cost Recovery Order.[15] This argument is no more substantial than the Applications' attempts to limit cost recovery solely to a "but for" test, and should be summarily rejected.

U S West and CBT rest their claim on a single sentence from the LNP Cost Classification Order:

> LECs must distinguish the costs of providing local number portability itself, recoverable through the federal charges provided in the [LNP Cost Recovery Order], from general network upgrade costs recoverable through the price caps and rate-of-return mechanisms.[16]

The Bureau, of course, did not by this statement direct ILECs to recover all "but for" costs of LNP via access charges and other tariffs. Indeed, the LNP Cost Classification Order, like the LNP Cost Recovery Order, makes clear that LECs are not automatically entitled to recover the indirect costs of LNP from any source. The Bureau simply did not rule on the question whether specific alleged indirect costs of LNP could be recovered in other tariffs. Instead, the sentence on which CBT and U S West seek to rely merely observes that costs

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14 See CBT, p. 7, U S West, pp. 13-14.

15 See LNP Cost Recovery Order, ¶ 135.

16 LNP Cost Classification Order, ¶ 9.

other than those directly related to LNP may only be recovered, if at all, through other mechanisms.

III. CBT'S AND U S WEST'S "TAKING" ARGUMENT IS MERITLESS

Finally, Cincinnati Bell and U S West argue that the LNP Cost Classification Order would take ILECs' property, in contravention of the Fifth Amendment.[17] U S West's Application tosses out figures that purportedly quantify the effect of the Bureau's adoption of the LNP Cost Classification Order; however, that ILEC provides no support of any kind for its claims, while CBT fails even to hazard even unsupported figures such as U S West's. Moreover, neither U S West nor CBT demonstrates that it will in fact be unable to recover its indirect costs of LNP -- they merely observe that they cannot recover them via LNP surcharges and query charges. But even accepting U S West's claims at face value, it is plain that it cannot make out a taking claim. The Supreme Court has made clear that a regulated utility can show a taking only by demonstrating that its rates are so low that they in fact "jeopardize the [company's] financial integrity."[18] "So long as a [carrier] is not caused by [the challenged order] to lose money on its over-all business" there can be no Fifth Amendment violation.[19] Whatever the effect of the LNP Cost Classification Order, it plainly does not rise to this level.

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17 See CBT, p. 8; U S West, pp. 17-19.

18 See, e.g., Duquesne Light Co. v. Barasch, 488 U.S. 299, 312 (1989). Incredibly, both U S West and CBT attempt to rely on Duquesne to support their takings claims. See CBT, p. 8; U S West, pp. 17-19.

19 Baltimore & Ohio R. Co. v. United States, 345 U.S. 146, 148 (1953).

CONCLUSION

For the foregoing reasons, the applications for review should be rejected.

Respectfully submitted,

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January 28, 1999

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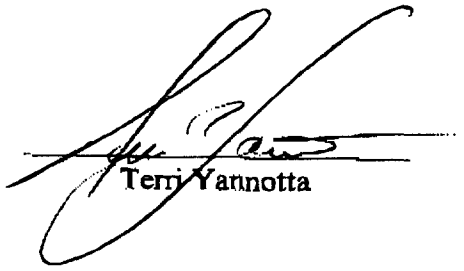
Bell Atlantic

Cincinnati Bell Telephone Company ("CBT")

U S West Communications, Inc.

CERTIFICATE OF SERVICE

I, Terri Yannotta, do hereby certify that on this 28th day of January, 1999, a copy of the foregoing "AT&T Corp. Opposition To Applications For Review" was mailed by U.S. first class mail, postage prepaid, to the parties listed on the attached service list.



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